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Officers - Eligibility and Qualification - Legislator Creating Office or Increasing Emoluments

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plished by reference to the traditional competency-credibility dicotomy, since that is the focal point of the problem.

The author concludes that in order to justify the existence of the Massachusetts view over the New York procedure, more reasoning is necessary than an attack on the jury determination of a factual issue.

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OFFICERS—ELIGIBILITY AND QUALIFICATION—LEGISLATOR CREATING OFFICE OR INCREASING EMOLUMENTS—In an original proceeding to determine the right of three candidates to run for the offices of governor and secretary of state, where each candidate had been a member of the previous legislature, which had passed a small across-the-board salary increase for all state offices, the Utah Supreme Court *held,* one judge dissenting, that the Utah constitutional provision[1] forbidding any legislator during his term of office to seek any civil office which had been created, or for which the emoluments had been increased during his term of office, was not violated by the legislature's general "cost-of-living" salary increase,[2] and that the legislators were eligible to hold such state offices. The chief justice dissented on the grounds that the constitutional provision was clear and unambiguous, and that the majority, by judicial fiat, had expanded the intent of the constitution. *Shields v. Toronto,* 395 P.2d 829 (Utah 1964).

More than half the states,[3] following the example of the federal constitution,[4] have enacted constitutional provisions similar to the Utah provision interpreted above. These jurisdictions have generally construed such provisions strictly and have barred legislators from running for offices created during their term of office, such as special legal counsel,[5] justice of the peace,[6] industrial commission,[7] war emergency council,[8] levee commissioner,[9] city police judge,[10] and circuit judge.[11] Courts have also barred legislators when the emoluments were increased for such offices as county

1. UTAH CONST. art. VI, § 7.
2. The salary of the secretary of state was raised from $10,500 to $11,000, and the governor's was raised from $13,200 to $15,000.
3. *E.g.,* FLA. CONST. art. 3, § 5; MINN. CONST. art. 4, § 9; N.D. CONST. art. 2, § 39; S.D. CONST. art. 3, § 12; UTAH CONST. art. 6, § 7.
4. U.S. CONST. art. 1, § 6, cl. 2.
5. Palmer v. State, 11 S.D. 78, 75 N.W. 818 (1898); *but cf.* State *ex. rel.* Landis v. Futch, 122 Fla. 837, 165 So. 907 (1936).
6. Kimble v. Bender, 173 Md. 608, 196 Atl. 409 (1938).
7. State *ex. rel.* Jugler v. Grover, 102 Utah 41, 125 P.2d 807 (1942); *but cf.* Shields v. Toronto, 395 P.2d 829 (Utah 1964).
8. Opinion of the Justices, 244 Ala. 386, 13 So. 2d 674 (1943).
9. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169 (1858).
10. Montgomery v. State *ex rel.* Enslen, 107 Ala. 372, 18 So. 157 (1895).
11. State v. Porter, 1 Ala. 688 (1840).

commissioner,[12] circuit judge,[13] county auditor,[14] and state comptroller.[15]

A more liberal approach has excluded as an increase in the emoluments of an office, a legislative enactment which increases the state's contribution to the salary of a civil office but which does not affect the total salary of the position.[16] Likewise, retirement benefits for supreme court judges have been construed as contingent benefits and not as emoluments.[17] In 1961 the North Dakota Supreme Court[18] permitted William Guy to assume the office of governor by ruling that the purchase of an automobile for the use of the governor, payment of expenses of the governor's office for previous years, and an increase in social security coverage for the governor were not included in the meaning of the term emoluments, and, therefore, a legislator serving during the term of the enactment of these increases could seek the office of governor during his legislative term. Although the North Dakota court has never treated the question of whether direct salary increases would bar a legislator from seeking such office, the Utah court implies that the North Dakota decision in the *Guy* case, by analogy, provides precedent for allowing moderate salary increases on an "across-the-board basis in keeping with the steadily rising costs of living."[19]

Prior to the Utah decision, only Florida and South Dakota had held that a direct salary increase for a civil office would not prohibit a legislator from seeking such office during the term of the increase. Florida in 1954,[20] overruling previous decisions,[21] and in spite of a vigorous dissent, held that an increase in the governor's salary was only for the then current term; and that the death of the governor in mid-term, necessitating a special election, could not have been contemplated by a legislator who sought to fill the vacant office. The court, in upholding this decision in 1963,[22] again allowed a legislator to seek the office of governor during the same term of a salary increase by reasoning that because the legislature had been silent since the 1954 opinion, its earlier broad interpretation was still controlling. South Dakota in 1954[23] permitted Joe Foss to seek the office of governor after he had participated in legislative enactments

12. State v. Erickson, 180 Minn. 246, 230 N.W. 637 (1930).
13. State *ex rel.* Hawthorne v. Wiseheart, 158 Fla. 267, 28 So. 2d 589 (1946); *but cf.* Adams v. Matthews, 156 So. 2d 515 (Fla. 1963); State *ex rel.* West v. Gray, 74 So. 2d 114 (Fla. 1954).
14. State *ex rel.* Pennick v. Hall, 26 Wash. 2d 172, 173 P.2d 153 (1946).
15. State *ex rel.* Fraser v. Gay, 158 Fla. 465, 28 So. 2d 901 (1947); *but cf.* Adams v. Matthews, *supra* note 13; State *ex rel.* West v. Gray, *supra* note 13.
16. State *ex rel.* Benson v. Schmahl, 125 Minn. 104, 145 N.W. 794 (1914); State *ex rel.* Johnson v. Nye, 148 Wis. 659, 135 N.W. 126 (1912).
17. State *ex rel.* Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938).
18. State *ex rel.* Lyons v. Guy, 107 N.W.2d 211 (N.D. 1961).
19. Shields v. Toronto, 395 P.2d 829, 831 (Utah 1964).
20. State *ex rel.* West v. Gray, *supra* note 13.
21. State *ex rel.* Fraser v. Gay, *supra* note 15; State *ex rel.* Hawthorne v. Wiseheart, *supra* note 13.
22. Adams v. Matthews, *supra* note 13.
23. State *ex rel.* Grigsby v. Ostroot, 75 S.D. 319, 64 N.W.2d 62 (1954).

providing across-the-board salary increases for state offices. The court reasoned that a more recent constitutional provision[24] enabling legislators to increase the salaries of state officers as well as their own, superseded the earlier prohibitive constitutional provision, because by any other interpretation, legislators could not increase their own salaries without resigning.

The Utah Supreme Court has made a bold, practical step toward the implementation of modern administrative practices in state government. The court correctly reasons that the right to vote for the candidate of one's choice is fundamental,[25] and that the constitutional restriction regarding the creation or increase of emoluments of civil offices should be limited to obvious "improper machinations."[26] Although the electorate rejected the legislature's recent attempt to amend North Dakota's constitutional provision,[27] the Utah approach would be a sensible alternative for the North Dakota court, to facilitate the enactment of needed salary increases for state offices without impairing leadership development in the legislature.[28]

SCOTT ANDERSON

INSURANCE—DEFENSE OF ACTIONS—DUTY TO DEFEND BEYOND POLICY LIMITS—PLAINTIFFS, the insurers of certain bottled gas distributors, sought a declaratory judgment relieving them of the cost of defending suits arising out of a bottled gas explosion October 31, 1963. Plaintiffs admitted liability and joined a number of potential claimants as defendants. The United States District Court found that the fair settlement value of the suits filed would exceed the insurance coverage and *held* that by interpleading the amount of the policies, the plaintiffs had discharged their obligation under the insurance contracts and were under no duty to defend suits brought against their assureds. *Commercial Union Ins. Co. v. Adams*, 231 F. Supp. 860 (S.D. Ind. 1964).

An insurer's duty to defend, in the name of the insured, all suits which fall within the limits of coverage is well settled.[1] The principal controversy involves an insurer's duty to defend after coverage is exhausted. Where an insurer has defended an action approaching or equalling the policy limits and has asked to be relieved of further

24. S.D. CONST. art. 21, § 2.
25. Shields v. Toronto, *supra* note 19, at 832; *accord*, State *ex rel.* Benson v. Schmahl, *supra* note 16, at 795.
26. Shields v. Toronto, *supra* note 19, at 831.
27. N.D. Sess. Laws 1963, ch. 453, defeated in the primary election of June 30, 1964, by 59,955 to 46,029.
28. See Shields v. Toronto, *supra* note 19, at 834.

1. See generally 31 N.D.L. Rev. 67 (1955).